Supreme Court, U.S.
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No. 93-702

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NENITA S. VILLAR,
et al,

Petitioners

v.

CROWLEY MARITIME CORPORATION, et al,

Respondents

Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION FILED BY RESPONDENTS

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GTO Corporation, n/k/a WTO Corporation, Respondent

Genstar Corporation, Respondent

Fednav Ltd., Successor in Interest by Merger to Federal Commerce & Navigation Ltd., Respondent

Federal Pacific Ltd., Respondent

Ross Insurance Limited, Successor In Interest to Genstar Overseas, Limited, Respondent

Saudi Arabian Transport Organization Ltd., Respondent

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION FILED BY RESPONDENTS

Petitioners hereby respond to Respondents Brief In Opposition to Petitioners' Petition for Writ of Certiorari as follows:

I. Reply To Respondents Discussion of the Alleged "Facts" in This Case

The Respondents discussion of the "facts" in this case is, plainly stated, fallacious and superficial. The Respondents have simply employed the approach utilized by the district court and the Panel Majority of the Court of Appeals. Though admitting, in the fraudulent joinder context, that the burden was upon the Respondents to prove by "clear evidence" that there was "no possibility" that any one of the seven alien defendants could have been found by the state court to have been subject to the in personam jurisdiction of the Texas courts, they have finessed this burden in three ways:

(1) Through giving lip service to the foregoing proper burden, the district court and the Panel Majority have in fact decided, and the

Respondents have in fact argued, that the burden is upon the Petitioners rather than the Respondents and that that burden is one that even exceeds the "prima facie" burden discussed by the district court, see A55-57, and the Panel Majority, A95, 96; they have in fact imposed a preponderance of the evidence burden upon the Petitioners. This is demonstrated by the way in which the courts below have gleaned out of the record, and only mentioned, the evidence that is favorable to the Respondents. For example, compare the district court's recitation of the "evidence", A38-A43, to that of Petitioners', pp. 12-21 of the Petition, the latter containing a specific citation to the records, depositions and affidavits.[1]

(2) In improperly applying a "preponderance of the evidence" standard, rather than a "prima facie" or "no possibility" standard, the district court, Panel Majority and

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[1] It is important to note that the Respondents did not question or challenge any of the Petitioners' citations to the record about the evidence before the district court. See entire Brief In Opposition.

Respondents, in violation of this Court's admonitions in Wilson v. Republic Steel, 42 S.Ct. 35, (1921), utilized conclusory, general and superficial statements to the effect that there was no alter ego, agency or other relationship between the Texas registered parent, CMC, its subsidiaries or related companies, CMI, GTC and/or SATOL. The courts below and Respondents did not pierce these conclusory statements with an analysis in depth of the evidence.

(3) Then, in an attempt to gloss over what was, in fact, a finesse of the "no possibility" rule, the courts below made astounding statements that, "in the alternative", the Respondents had somehow "clearly" shown that there was "no possibility" that, under state and federal law on alter ego, agency and joint actions,[2] a state court could have found that any one of the seven alien defendants was subject to the in personam

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[2] We noted in the Petition how the Panel Majority blatantly misconstrued Texas state law on the question of alter ego, see footnote 17 at p. 42, 43 of the Petition, and the Respondents did not, in their Brief In Opposition, attempt to refute Petitioners observation in that regard.

jurisdiction of the Texas courts. In making this shocking statement, the district court, see footnote 21 of district courts's opinion, A57, and the Panel Majority of the Court of Appeals, A96, did not deign to explain such conclusion and they inexplicably totally ignored the undisputed evidence that the CMC people occupied almost all of the managerial positions in CMI, GTO and SATOL, including those involving the day-to-day operations of the CMC/GTO/SATOL lighterage operation in Saudi Arabia.

The Respondents, in their Brief in Opposition, attempt to perpetuate and capitalize upon what has been a "fact finding" travesty by the courts below, by making these statements: (a) Respondents state that "petitioners repeatedly mischaracterize the foreign defendants as subsidiaries of CMC, when both of the lower courts have ruled that there is no basis whatever for such a conclusion". Yet, the district court conceded that, with respect to the three key alien defendant corporations, CMI, GTO and SATOL, CMC owned 100% of CMI, A4; CMC owned at least 33-

1/3% of GTO and, in 1979, became 100% owner of GTO (later called WTO), A5; and CMC owned at least 20% of SATOL. Indeed, in terms of percentages of de facto control, as distinguished from ownership, almost 100% of the managerial positions, including positions involving day-to-day operations, of CMI, GTO and SATOL were occupied by CMC people and this central reality, as described in the Petition, pp. 12-21, has never been refuted by the Respondents, see entire Brief In Opposition, the district court opinion, A1 to A87, or the Panel Majority of the Court of Appeals, A88 - A144.[3]

(b) Respondents then state that "(a)ccording to petitioners, CMC was the alter ego of all of the foreign defendants." See p. 11, Opp. Bf. That statement is a flat-out misrepresentation. As noted at pp. 12-21 of the

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[3] The Respondents did state that "(t)he undisputed evidence showed that CMC did not dominate either SATOL or GTO." But, again, the Respondents only talked in terms of directors and percentage of stock ownership, but did not ever confront the reality that almost all of the key managerial personnel were CMC people and that, through them, CMC indisputably dominated and controlled CMI, GTO and SATOL.

Petition, Petitioners never contended that Fednav, GenStar, FedPac or Ross Insurance Ltd. were subsidiaries of CMC. They or their affiliated companies were joint-venture owners in GTO which, at the time of the accident in question, was indisputably formally registered to do business in Texas. A15.

(c) Respondents next astoundingly state "that the undisputed evidence showed conclusively that CMC was not the alter ego of the foreign defendants." Again, the evidence described in the Petition at pp. 12-21, has never been refuted by Respondents and such evidence clearly demonstrates that the potential alter ego relationships between CMC and CMI, GTO and/or SATCL are at least factually disputed issues concerning which prima facie cases of alter ego exist. (d) Respondents also attempt to exploit the district courts' injudicious obsession and blatant misinterpretation of the Runion Affidavit. See p. 13, 16 of Bf. in Opp. Respondents do not contradict Petitioners proper analysis of that affidavit. See pp. 14, 15 ("...

the affidavit of John Runion was never contradicted by defendants"), 21 and 40-42, including footnote 16, of the Petition.[4]

Indeed, even if the affidavit were ignored, the depositions of CMC's own employees (Messrs. Maguire, Watkins and McLean) more than establish a prima facie case of in personam jurisdiction over CMI, GTO and SATOL through principles of alter ego, agency, joint contacts, the "business conduit" rule, the inadequate capitalization concept, and the "working of an injustice" doctrine (through transfer of assets after the

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[4] The district court only identified two specific complaints – that Mr. Runion should not have omitted a phrase from the quoted portion of the Maguire deposition and that he expressed legal opinions. A49-51, A82-83. But the district court admitted that the omission was obvious (because of the . . .); the district court referred to it as an "easily discoverable" omission, A83). Mr. Runion, in his affidavit, gave the legal definition of alter ego and the other legal terms that were used by him in expressing his opinions so that the bases for his opinions were easily ascertainable. See A161-191. In short, the Respondents engage in judicial McCarthyism by stating that Mr. Runion based his opinions "on gross mis-statements of the evidence . . . ". Again, the only alleged "misstatement" referred to by the district court, the Panel Majority of the Court of Appeals or Respondents was the omission in the quote from the Maguire deposition, which omission was identified by the . . . The use of the term "gross misstatement" was, to put it bluntly, a gross overstatement. For an accurate assessment of what Mr. Runion had to say as to matters that were relevant, see Petition at 21, 40-42 and affidavit at A161-191.

accident in question). See pp. 12-21, 39-46 of Petition.

II. This Court's Decisions Concerning Grant of Certiorari on Issues Similar To Those Involved In This Case

A. Factual Determinations. The Respondents cite United States v. Johnston, 268 U.S. 220, 227 (1925) for the proposition that this Court's role is not "to review evidence and discuss specific facts". Bf. in Opp. at 9. However, the Court, having said that, went on in United States v. Johnston to undertake, in a fashion, essentially a factual consideration of the issues. 268 U.S. at 227. And the Court has not hesitated in the past to take a realistic view of the evidentiary posture of a case in granting certiorari. See Bose Corp. v. Consumers Union, 466 U.S. 485, 499, 511 (1984); Workman v. New York City, 179 U.S. 582, 555 (1900) (even though both lower courts have concurred in a finding of fact, it will not, in the Supreme Court, be accepted as conclusive if it appears "that the lower courts obviously erred"); Mayor of Philadelphia v. Educational

Equality League, 415 U.S. 605, 621, nte. 20 (1974) (the Court can, in an appropriate situation, determine whether the court of appeals applied a proper fact review standard and then apply that standard to the findings of the district court); Universal Oil Products Co. v. Globe Oil & Ref. Co., 332 U.S. 471, 473 (1944); Great Atlantic & Pacific Tea Co. v. Supermarket, 311 U.S. 377, 403-404 (1940) (lower court findings rejected; "(B)oth the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied"); Baumgartner v. U.S., 322 U.S. 665, 670-671 (1944) (refused to apply two-court rule because it "does not relieve us of the task of examining the foundation for findings in a particular case . . . The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment ... Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by

this Court"); and Furnco Construction Co. v. Waters, 438 U.S. 567, 98 S.Ct. 2943-46 ("We granted certiorari to consider important questions raised by this case regarding the exact scope of the prima facie case . . . and the nature of the evidence to rebut such a case"; and "We granted certiorari to consider whether the Court of Appeals had gone too far in substituting its own judgment. . .").

In this case, the fraudulent joinder issue involves a question of standards ("no possibility" or prima facie or preponderance of evidence), the application of the appropriate standard to the evidence, and a determination of the conclusions that may appropriately be drawn from the "whole mass of evidence". Moreover, the questions of law that need to be reviewed are, in certain respects, inseparable from the particular facts to which they are applied. Indeed, the claim by Respondents that this Court should accept the "findings" of the district court must pale before the obvious superficiality and shallowness of the alleged findings – they are

nothing more than "summary characterizations", as in Baumgartner, that blatantly ignore the mass of the evidence produced concerning the almost total domination of the CMC/GTO/SATOL lighterage operations by CMC.

B. Conflicts With the Holdings of This Court. Moreover, the holdings by the lower courts in this case with regard to fraudulent joinder disregard the substance and the spirit of this Court's holding in Wilson v. Republic Steel. Conflicts with this Court's holding — have repeatedly been considered sufficient grounds, in themselves, for granting certiorari. See Foucha v. Louisiana, 112 S.Ct. 1780 (1992) ("Because the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari"); Arizona v. Mauro, 481 U.S. 520, 107 S.Ct. 1931, 1934 (1987) ("Because the decision below appeared to misconstrue our decision in Rhode Island v. Innis . . . we granted the petition ..."); and Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural

Resources, 112 S.Ct. 2019, 2023 (1992) ("We granted certiorari . . . because of concern that the decision below was inconsistent with" an earlier decision of the Court).

C. Conflict Among the Federal Courts. In addition, we pointed out in the Petition the numerous crucial issues concerning which the holdings of the courts below in this case are in conflict with other federal decisions. This Court has frequently noted how important it is for the Court to resolve conflicts among the federal courts in order to maintain a uniformity in the law. See Chick Kam Choo v. Exxon, 486 U.S. 140, 108 S.Ct. 1684 (1988) (granting certiorari because of conflict between circuit courts concerning injunctions in forum non conveniens cases); Evans v. U.S., 112 S.Ct. 1881, 1883 (1992); U.S. v. Burke, 112 S.Ct. 1867, 1870 (1992); Wyatt v. Cole, 112 S. Ct. 1827, 1829 (1992); and Marks v. U.S., 430 U.S. 188, 97 S. Ct. 990 991 (1977).

These conflicts include:

(1) The important question, which this Court has

recognized as important but has pretermitted because of the absence of a conflict in past cases between state and federal law, see Gulf Oil v. Gilbert, 67 S.Ct. 839 (1947) and Piper Aircraft v. Reyno, 454 U.S. 235 (1981), of whether state or federal forum non conveniens law applies in a diversity case tried in federal court.[5]

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[5] In this regard, the Respondents make another statement that is blatantly incorrect. They state in their Opposition Brief that: "Petitioners do not dispute this rule but contend it should not apply in a case removed from state court. In petitioners' world, in a suit filed initially in federal court on diversity grounds, federal forum non conveniens law should apply." Throughout this litigation, as Respondents well know, Petitioners have taken the position that the Fifth Circuit cases, Nolan v. Boeing Co., 919 F.2d 1058, 1068 n. 11 (5th Cir. 1990), cert denied, 111 S. Ct. 1587 (1991); and In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated on other grounds sub nom Pan Am World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989), affirmed in relevant part, 883 F.2d 17 (5th Cir. 1989), holding that federal forum non conveniens law applies in diversity cases even where the application of such federal law makes a difference in the outcome, are incorrect and conflict with Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945) and other federal authorities. We did argue that state forum non conveniens law should apply with even more force where the plaintiffs initially choose the state forum and are removed to federal court. See pp. 49-52 of Petition. But we have never conceded that Nolan, In Re Air Crash and this case were correctly decided on such issue and have always contended that state forum non conveniens law should apply in diversity cases, regardless of whether the plaintiffs initially choose the federal or state forum, as long as the application of federal forum non conveniens law (or the failure to apply state forum non conveniens law) would make a difference in the

(2) The issue of whether, when a federal court to which a case filed in state court has been removed, decides that it will reject jurisdiction over the case and dismiss it on grounds of forum non conveniens, it should remand instead of dismissing. See conflicting authorities discussed at pp. 46-48.

(3) The conflicts in the cases dealing with the questions surrounding the undisputed facts that GTO was formally registered to do business in Texas at the time of the accident in question; that, after the accident but before the filing of suit, GTO terminated its registration in Texas, transferred its assets to CMC and CMC acquired all of the stock of GTO; and the impact of those facts upon the removal/remand issue. See pp. Petition at 33-37. Respondent referred to the Panel Majority's characterization of the GTO facts as "frivolous" with a passing reference in a footnote. See footnote 3 at p. 12 of the Opp. Brief, referring to Panel Majority's opinion at

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outcome.

A110, nte 6. However, neither the Respondents nor the Panel Majority nor the district court ever confronted the issue of whether, under the holdings in such cases as Connecticut Mutual Life Insurance Co. v. Spratley, 172 U.S. 609 (1899) and Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) and other cases discussed at pp. 33-37 of the Petition, when considered with the Texas law on discontinuance of corporate registration id., GTO remains subject to the in personam jurisdiction of the Texas courts for the purposes of this lawsuit until the debt created by this lawsuit has been paid. The potential conflict with those authorities and the holding of the courts below, and the uncertainty in this area of the law, suggests the need for certiorari intervention.[6]

(4) Another area of the law in which there is direct conflict between the holdings of the

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[6] This Court has recurringly recognized the importance of issues dealing with removal/remand Wilson v. Republic, supra; Gay v. Ruff, 292 U.S. 25 (1934); Gravitt v. Southwestern Bell Telephone, 430 U.S. 723 (1977); and Finley v. U.S., 490 U.S. 545 (1989).

courts below and cases of this Court and of other federal circuits, is that dealing with the failure of the district court and the Panel Majority to allow Petitioners the right to engage in discovery. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guines, 456 U.S. 694, 709 (1982); the cases cited in the dissent in the Court of Appeals decision in this case (by Judge Johnson), A130-A144, and the Petition at pp. 30-33, inclusive of ftnte. 11, p 32. The Respondents, in notably failing to address Judge Johnson's piercing dissent, simply joined the refrain of the court below, see Bf. in Opp. at 12, 13, and never faced up to the undeniable fact that Petitioners, as Judge Johnson so correctly pointed out in his dissent, had never been given the opportunity to engage in discovery with regard to the question of whether the seven alien defendants were subject to the in personam jurisdiction of the Texas courts.

As noted in Compagnie des Bauxites, the question of discovery with respect to jurisdiction is sufficiently important to merit

grant of certiorari.

D. Importance of Issues as Grounds for Certiorari.

This Court has frequently granted certiorari on the ground that the issues are "important". See Burson v. Freeman, 112 S.Ct. 1846 (1992); Foucha v. Louisiana, supra; Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464, 102 S.Ct. 752, 757 (1982) ("Because of the unusually broad and novel view . . . adopted by the Court of Appeals, we granted certiorari").[7]

Our request that the Court reexamine the forum non conveniens doctrine; all the issues pertaining to removal/remand; the question of applicable forum non conveniens law in diversity cases; the right to discovery in fraudulent joinder cases; the question of sanctions in a

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[7] The Panel Majority's view that defendants can remove plaintiffs from their chosen forum on fraudulent joinder grounds; the federal district court can then refuse discovery on the issues pertaining to fraudulent joinder; and in refusing to remand, the court can ignore voluminous evidence establishing a prima facie case that the joinders were not fraudulent, is, we suggest, an excessively broad and novel holding, justifying the grant of certiorari.

case where the attorney's positions have all consisted of a reasonable effort to secure clarification of, or change in, existing law;[8] and all of the issues which the Petitioners have raised in this case are important, not just to Petitioners, but to the hundreds of litigants who are removed to federal court each year, who face forum non conveniens motions, who seek discovery in connection with removals, and who are sanctioned. They are also important to the bodies of law dealing with removal/remand and forum non conveniens.

For all of the foregoing reasons we

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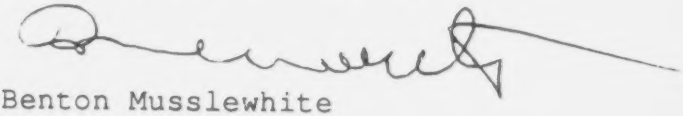
[8] The Respondents again wander beyond the bounds of reasonable advocacy. They state: "Innovative advocacy does not include making frivolous arguments that have absolutely no support in existing law or in the undisputed facts. Nor does it include submitting affidavits containing misrepresentations." True to form, Respondents never spell out just what those frivolous arguments are, except to mention "alter ego". It must be remembered that "alter ego" has been used to embrace several theories whereby the presence of a registered defendant can constitute also the presence of a non-registered subsidiary or related defendant. Petition at pp. 39-46. Petitioners' positions on these various alter ego theories are not only reasonable, but they are absolutely right. Respondents' claim that Petitioners' co-counsel submitted an affidavit containing misrepresentations is equally untenable. Omitting portions of an excerpt with a . . . in it does not constitute a misrepresentation.

respectfully submit that this Court should grant certiorari in this case.

Respectfully submitted,



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